

LAWRENCE E. BERGSTEIN,
appellant,

v.

U.S. POSTAL SERVICE,
agency.

DOCKET NUMBER
PHO7528410506-1

DATE: AUG 8 1985

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

This appeal is currently pending before the Board's Philadelphia Regional Office on remand from the Board to afford the appellant a new hearing with legal representation and a new adjudication of the appeal. The appellant filed a motion for the presiding official to recuse himself from hearing the appeal on remand because he had improperly heard the appeal before and rendered an initial decision vacated by the Board. The appellant argued that the presiding official cannot now afford him a fair and impartial hearing.

The presiding official denied the motion for recusal, but granted the appellant's subsequent motion to certify the issue to the Board on interlocutory appeal, as well as the appellant's motion for a stay of his appeal pending the Board's issuance of a decision on interlocutory appeal. The presiding official found that the issue qualified for certification because it involved an important question of policy about which there appear to be substantial grounds for differences of opinion, and because an

immediate ruling will materially advance the completion of the proceeding, as required for certification under 5 C.F.R.

§ 1201.93. At the same time, however, the presiding official deferred ruling on the agency's motion to dismiss the appeal, on the basis of the appellant's alleged failure to prosecute, until the interlocutory appeal has been resolved.

In his motion for certification of the interlocutory appeal, the appellant contended that the presiding official had previously conducted an ex parte hearing in the appeal and rendered an initial decision in which he considered irrelevant testimony that will color his readjudication of the appeal on remand to the prejudice of the appellant. Technically, of course, the presiding official did not conduct an ex parte hearing when initially considering the appeal since the appellant himself, albeit without counsel, attended the hearing and participated in it. Moreover, the Board has held that "[t]he fact that a [hearing officer] may be overruled by a higher authority or that he may make rulings contrary to the wishes of one of the parties does not constitute personal bias...." In the Matter of King, 1 MSPB 144 (1979). In addition, the Board has held that it will not disqualify a presiding official for bias simply because it is remanding a case to that official who previously held against the appellant. Gipson v. Veterans Administration, 7 MSPB 86 (1981).

The appellant nonetheless claims that the presiding official demonstrated "a basic lack of fair play" in denying the appellant's request for a continuance of the hearing in the first instance so that his representative could attend, in not seeking an explanation for the appellant's request, in telling the appellant that his legal representative should have sent another attorney from his office to the hearing when no other attorney could have attended, in allowing into the record irrelevant testimony despite the appellant's inartful "objections" that the testimony was not true, and in not recognizing that the appellant could not receive a fair hearing without counsel to represent him. We find that our order of March 22, 1985, remedied any

errors in this regard by vacating the presiding official's original initial decision and remanding the appeal for a new hearing and a new adjudication of the appeal. We find further that these actions by the presiding official, whether improper or not, are insufficient to overcome the "presumption of honesty and integrity which accompanies administrative adjudicators." Oliver v. Department of Transportation, 1 M.S.P.R. 382, 386 (1980).

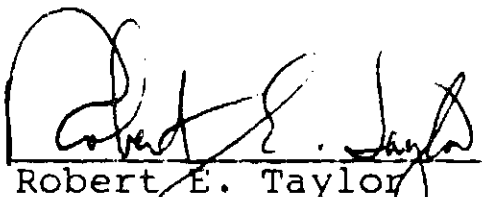
The appellant claims further that the presiding official has demonstrated something less than impartiality on remand. Specifically, he complains that the presiding official should have consulted him before scheduling a new hearing in order to avoid another schedule conflict, that the presiding official refused his request for a continuance despite the previous reversal on the same grounds, and that the presiding official implicitly (and later, expressly) denied his request for assistance in obtaining information on discovery by way of written interrogatories.

We find that the appellant has failed to demonstrate the presiding official's abuse of his discretion to schedule a hearing under 5 C.F.R. § 1201.41. It is common practice for presiding officials in the Board's regional offices to schedule hearings and then alter those schedules when necessary because of a variety of circumstances. We also note the appellant's allegation that the presiding official improperly denied his request for a continuance of the hearing on remand was subsequently rendered irrelevant when the presiding official granted the appellant's request for a stay of his appeal pending the Board's resolution of this interlocutory appeal. Finally, we do question the propriety of the presiding official's denial of the appellant's request for discovery assistance, based on the untimeliness of the request under 5 C.F.R. § 1201.73(d)(5), for the reasons set forth in our remand order regarding the difficulties encountered by the appellant in obtaining proper legal representation. We cannot find, however, that any of these rulings, individually or together, demonstrate that the presiding official cannot conduct a second hearing and render a

new initial decision in a fair and impartial manner. See Oliver, supra. See also Fuhs v. U.S. Postal Service, MSPB Docket No. BN07528410043 at 2 (July 20, 1984) ("[n]either the failure of the presiding official to agree with an appellant's assertions, nor previous rulings against a party, even if erroneous, is sufficient to overcome the presumption" of impartiality).

Accordingly, the appellant's motion that the presiding official recuse himself from the remand proceedings in this case is hereby DENIED, and the presiding official is directed to vacate his stay order and resume the readjudication of this appeal. */

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.

*/ In considering the appellant's motion for certification of this interlocutory appeal, the presiding official might have first ruled on the agency's motion to dismiss the appeal because of the appellant's alleged failure to prosecute it, rather than postpone ruling until after the interlocutory appeal has been resolved, as he did. While we make no finding on the agency's motion, the presiding official's ruling on it then could have obviated the need for this interlocutory appeal.